

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re	:	
MBM ENTERTAINMENT LLC, MBM DEVELOPMENT LLC, and ALTRIA DEVELOPMENT LLC,	:	Chapter 11
	:	Case No. 14-10991 through 14-10993
	:	(Jointly Administered)
<u>Debtors.</u>	:	
JANINA Y. DAVIS,	:	
	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 14-02231 (MEW)
	:	
M&M DEVELOPER, LLC, MOUSSA YEROUSHALMI, MURAD YEROUSHALMI AND ALTRIA, LLC	:	
	:	
<u>Defendants.</u>	:	
JANINA Y. DAVIS,	:	
	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 14-02386 (MEW)
	:	
MOUSSA YEROUSHALMI, MURAD YEROUSHALMI, FARZENAH YEROUSHALMI, MBM DEVELOPMENT, LLC, AND M&M DEVELOPER, LLC	:	
	:	
<u>Defendants.</u>	:	
JANINA Y. DAVIS,	:	
	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 15-01086 (MEW)
	:	
M&M DEVELOPER, LLC, MOUSSA YEROUSHALMI, MURAD YEROUSHALMI, FARZENAH YEROUSHALMI AND MBM DEVELOPMENT, LLC,	:	
	:	
<u>Defendants.</u>	:	

## DECISION AND ORDER

On March 26, 2015, the Debtors filed motions for summary judgment (the “SJ Motions”) in each of the above-captioned adversary proceedings. Plaintiff’s counsel requested a conference with the Court concerning responses, a potential cross-motion, and scheduling; and a conference call was held on March 31, 2015.

The Court, having reviewed the SJ Motions and having considered the parties’ arguments, concludes that the issues proposed to be raised by Plaintiff in a cross-motion are fact-intensive and inappropriate for summary judgment. The Debtors’ SJ Motions are denied, without need for further briefing or argument. The Debtors argue that § 544(a) allows the Debtors to negate a claimed constructive trust. However, while this is the view in some Circuits, the Second Circuit has ruled to the contrary. *See Sanyo Elec., Inc. v. Howard’s Appliance Corp. (In re Howard’s Appliance Corp.)*, 874 F.2d 88, 93-93(2d Cir.1989); *see also Buchwald v. Di Lido Beach Resort, Ltd. (In re McCann)*, 318 B.R.276, 285 (Bankr. S.D.N.Y. 2004). Accordingly, the Court will hold a trial to consider the constructive trust claim.

The Debtors also argued in the SJ Motions that the complaints only allege breaches of contract and not separate claims of fraud. However, a fair reading of the complaints shows that they allege that representations were made outside of the contracts, which requires a trial on the fraud claims. *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.* 98 F. 13, 20 (2d 1996) (noting that a fraud claim is distinct from a breach of contract claim where a party alleges “a fraudulent representation collateral or extraneous to the contract”); *see also, Deerfield Comms. Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986).

Based upon the foregoing, it is hereby

ORDERED, that the Plaintiff's request to file a cross-motion for summary judgment is denied; and it is further

ORDERED, that the Debtors' SJ Motions are denied; and it is further

ORDERED, that this Court's prior scheduling Orders are hereby amended, so that pre-trial submissions shall be due on April 13, 2015, a final pre-trial conference shall be held on April 16, 2015 at 10:00 a.m., and the trial will commence either on April 24 or April 27, with the date and time to be determined at the final pre-trial conference.

Dated: New York, New York  
March 31, 2015

s/Michael E. Wiles  
UNITED STATES BANKRUPTCY JUDGE